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Supreme Court
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Supreme Court of the United States

PREWITT ENTERPRISES, INC., *et al.*,

Petitioners,

—v.—

ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an agreement between a foreign government and a defendant located within its borders which provides that the defendant cannot be served process without its consent will completely immunize the defendant from service by a U.S. federal court.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Prewitt Enterprises, Inc. was the appellant below. The petitioner represents a putative plaintiff class comprised of all U.S. consumers of refined petroleum products. This class excludes the Organization of the Petroleum Exporting Countries ("OPEC"), counsel for the parties, and members of the judiciary.

The respondent in this Court, appellee below, is OPEC. As this brief explains *infra*, OPEC is an unincorporated association formed in Baghdad, Iraq in 1960 which has the principal aim of coordinating and unifying the petroleum policies of Member Countries.

RULE 29.6 STATEMENT

Petitioner Prewitt Enterprises, Inc. has no parent corporation and no publicly held company owns 10% or more of Prewitt Enterprise's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Prewitt Enterprises, Inc. ("Prewitt") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Petitioners seek to appeal a judgment holding that the Organization of the Petroleum Exporting Countries ("OPEC") cannot lawfully be served with process under the Federal Rules of Civil Procedure. The district court's order dismissing petitioners' complaint for improper service of process (Pet. App. 24a-37a) is unpublished. The district court's order denying petitioners' motion for rehearing and refusing to fashion alternative means of service pursuant to Fed. R. Civ. P. 4(f)(3) (Pet. App. 38a-39a) is also unpublished. The Eleventh Circuit's opinion (per Barkett, J.) holding that OPEC cannot lawfully be served with process under the Federal Rules of Civil Procedure (Pet. App. 1a-21a) is published at 353 F.3d 916. The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing (Pet. App. 22a-23a) is unpublished.

JURISDICTION

The Eleventh Circuit denied petitioner Prewitt's petition for rehearing on March 2, 2004. Prewitt timely filed this petition for certiorari, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

RULES INVOLVED

Rule 4(f)(3) of the Federal Rules of Civil Procedure provides in relevant part that service of process may be "effected in a place not within any judicial district of the United States . . . by other means not prohibited by international agreement as may be directed by the court."

Rule 4(f)(2)(A) provides in relevant part that service is lawful in a foreign jurisdiction if it takes place "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction." Rule 4(f)(2)(C) provides in relevant part that service in a foreign jurisdiction is lawful if accomplished by "any form of mail requiring a signed receipt" that is dispatched by the clerk of the court, unless that form of service is "prohibited by the law of the foreign country." The relevant provisions of the Federal Rules of Civil Procedure are reproduced in the appendix (at 40a-41a).

STATEMENT OF THE CASE

This petition arises from the dismissal of petitioner Prewitt's class action lawsuit against OPEC for violations of the U.S. antitrust laws. Both the district court and circuit court held that Prewitt's complaint should be dismissed because both courts believed that OPEC simply could not be served with process under U.S. law. This petition now challenges the ruling of the court below. The petition argues that the district court has the power to serve OPEC with process under Rule 4(f)(3) of the Federal Rules of Civil Procedure.

1. *The district court opinions.* Prewitt is a corporation organized and existing under the laws of Alabama with its principal place of business in Birmingham, Alabama.

Prewitt purchases substantial quantities of gasoline and other refined petroleum products for resale to the general public at its Eastwood Texaco Service Center gas station.

The Organization for the Petroleum Exporting Countries ("OPEC") is an unincorporated association formed in Baghdad, Iraq in 1960. OPEC's principal aim is "the co-ordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively." OPEC Stat. art. 2(A) (2000). OPEC has been headquartered in Vienna, Austria since September 1, 1965. Its relationship with the Austrian government is defined by the Agreement Between the Republic of Austria and the Organization of the Petroleum Exporting Countries Regarding the Headquarters of the Organization of the Petroleum Exporting Countries, Feb. 18, 1974, *BGBL* 1974/382 ("Headquarters Agreement") (*see* Pet. App. 42a-74a). Among other things, the Headquarters Agreement governs the circumstances under which OPEC can be served with legal process. On that issue, the Headquarters Agreement states that "the service of legal process . . . shall not take place within the [OPEC] headquarters seat except with the express consent of, and under conditions approved by, the Secretary General." *See Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003).

Prewitt filed a complaint seeking injunctive relief and attorneys' fees in the Northern District of Alabama against OPEC on behalf of itself and as the representative of all persons or entities who have indirectly purchased petroleum products in the United States since March 1999. Prewitt claimed that OPEC has been coordinating an international conspiracy through agreements among its Member States and non-OPEC members to limit the production and export of oil in order to fix

world oil prices above competitive levels. Prewitt argued that these agreements constitute violations of U.S. antitrust laws, specifically the Sherman and Clayton Acts, and have resulted in a substantial and adverse impact on U.S. trade and commerce. Prewitt alleged that it was harmed by these anticompetitive agreements, as its own acquisition and inventory costs for gasoline have increased significantly as a result of OPEC's illegal activity. Consequently, Prewitt requested that the court declare the OPEC-coordinated agreements illegal under U.S. law, enjoin implementation of the agreements, grant any other appropriate equitable relief, and award costs of the suit against OPEC for injuries sustained by Prewitt.

Prewitt initially attempted to serve OPEC by requesting that the district court send a copy of the complaint to OPEC by international registered mail, return receipt requested. The court clerk did so, mailing Prewitt's summons and complaint to OPEC at its headquarters in Vienna. The pleadings were signed for, stamped "received" by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division and other departments, including the Secretary General's office. OPEC's records reveal that the Secretary General spoke with the Director of OPEC's Research Division, and although they knew that the complaint originated "from a genuine court office," Pet. App. 76a, they decided "that the Secretariat should simply ignore the whole thing." *Id.* at 75a. It is therefore undisputed in this case that OPEC received both timely and actual notice of this action and of the deadline for responding to the Complaint.

Without OPEC's participation, the district court (Weiner, J., sitting by designation) certified a class and entered a default judgment and order of injunction against OPEC. *Prewitt Enters. v. OPEC*, No. CV-00-W-0865-S,

2001 WL 624789 (N.D. Ala., Mar. 22, 2001). The court found that there was a conspiracy between OPEC, its Member States, and certain non-OPEC Members to fix and control crude oil prices; that the agreements coordinated and implemented by OPEC were illegal under U.S. antitrust laws; that OPEC's illegal conduct has resulted in substantial and adverse impact on U.S. trade and commerce of approximately $80 to $120 million per day; and that OPEC and those acting in concert with OPEC should be enjoined from entering into, implementing, and enforcing any further oil price-fixing agreements for a period of twelve months. The court's orders were served on OPEC and copies thereof were also delivered to each of the U.S. embassies for OPEC's Member States.

In response, OPEC entered a special appearance and filed a motion to set aside the default judgment and stay its enforcement pursuant to Fed. R. Civ. P. 60(b)(1), (4), (5) and (6). Without allowing for opposition papers, a newly-assigned district judge (Clemon, J.) granted this motion, vacating the default judgment and injunction. OPEC then filed a motion to dismiss Prewitt's complaint on various grounds, including insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5). The district court bifurcated OPEC's motion and limited any discovery and briefing to the service of process issue.

After oral argument, the district court dismissed the case, finding that Prewitt's attempt at serving OPEC with process by international registered mail pursuant to Fed. R. Civ. P. 4(f)(2) had been ineffective. However, the court's opinion stated that the dismissal was "without prejudice to the right of [Prewitt] to pursue an alternative means of effecting service on [OPEC]." Pet. App. 36a. Accepting the court's invitation to pursue an alternative means of service, Prewitt filed a motion for recon-

sideration which requested the court to authorize alternative means of service pursuant to Fed. R. Civ. P. 4(f)(3). Unlike Rule 4(f)(2), Fed. R. Civ. P. 4(f)(3) does not require service of process attempted under that provision to comport with the law of the foreign state in which the defendant was located. Rather, Rule 4(f)(3) authorizes methods of service that are not authorized by either Fed. R. Civ. P. 4(f)(1) or 4(f)(2) so long as those means are "not prohibited by international agreement." Prewitt further argued that since OPEC had received actual notice of the lawsuit against it by the attempted service under Rule 4(f)(2), that service should be deemed effective *nunc pro tunc* under Rule 4(f)(3).

The district court denied the motion for reconsideration with a one-sentence Order which stated simply that OPEC "cannot in this case be effectively served with process." Pet. App. 38a.

2. *The circuit court's opinion.* Thereafter, Prewitt appealed to the Eleventh Circuit Court of Appeals, which upheld the district court in all respects. The circuit court considered whether extraterritorial service on OPEC could be accomplished through Fed. R. Civ. P. 4(f)(3). The circuit court held that it could not, stating that, "[o]n these facts, we cannot read 4(f)(3) as permitting that which has already been specifically prohibited under 4(f)(2)." *Prewitt*, 353 F.3d at 927.

The circuit court noted that the Advisory Committee Notes amplifying Rule 4 provided that, when service is effected pursuant to Rule 4(f)(3), "an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law." The court stated that this provision in the Advisory Committee Notes precluded service under Rule 4(f)(3) in this case because, "[r]ather than minimizing offense to Austrian law, the failure to obtain

OPEC's consent would constitute a substantial affront to Austrian law." *Prewitt*, 353 F.3d at 927.

The court below held that directing service of process on OPEC under Rule 4(f)(3) would constitute a clear abuse of discretion. *Id.* at 928 n.21. The Eleventh Circuit's view was that the district court simply lacked the power to fashion service under Rule 4(f)(3) because of the Headquarters Agreement.

This petition followed. Prewitt's argument is that, insofar as Rule 4(f)(3) is designed to allow service of process when a plaintiff is unable to fashion service that complies with the laws of a foreign state, both the district court and Eleventh Circuit clearly erred by stating that service on OPEC could under no circumstances be accomplished in this case.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for three reasons. *First*, the petition should be granted because of the far-reaching implications of the decision below. The Eleventh Circuit's law now stands foursquare for the proposition that any foreign government can agree with any organization located within its borders—a corporation plotting to violate U.S. antitrust laws, the Cali drug cartel, the Mafia, or even al-Qaeda—that the organization can violate the laws of the United States with no fear of being held accountable for its actions in a U.S. court so long as the organization has no agent in the United States that can properly be served with process. This simply *cannot* be a proper interpretation of the Federal Rules of Civil Procedure. Indeed, the panel's opinion has the perverse effect of subverting the restrictive theory of sovereign immunity embodied in the Foreign Sovereign Immunities Act ("FSIA") by allowing any for-

eign government, at any time, to immunize any organization within its borders from liability in U.S. courts merely by entering into an agreement with that organization providing that it cannot be served with process.

Second, the petition should be granted because the decision below creates a circuit split on this increasingly important question of service of process. The Eleventh Circuit's decision directly conflicts with the Ninth Circuit's opinion *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002), which explicitly denies that the contrary law of a foreign state can preclude service of process under Rule 4(f)(3), and with the considered view of numerous district courts that reached the same conclusion as the Ninth Circuit.

Third, the petition should be granted because the Eleventh Circuit's opinion misinterprets Rule 4(f)(3), elevating a misreading of the Advisory Committee Notes over the plain language of the Rule, which does not provide that the law of a foreign state can immunize a defendant located within its borders from service of process effected under Fed. R. Civ. P. 4(f)(3).

I. THE DECISION BELOW CREATES A LOOPHOLE PREVENTING SERVICE OF PROCESS ON FOREIGN WRONGDOERS AND SUBVERTS THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY EMBODIED IN THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The only question that this petition for certiorari presents is whether OPEC may be validly served with process. The Eleventh Circuit's holding that OPEC cannot be legally served with process because of the Headquarters Agreement creates bad law with implications far beyond the present lawsuit. Indeed, the Eleventh Circuit's opinion creates a massive loophole allowing foreign states to protect any potential defendants located

within their borders from service of process in U.S. courts for the violation of U.S. law. This loophole is extremely consequential, and could subvert the United States' move to the restrictive theory of foreign sovereign immunity.

a. *Loophole in the service of process rules.* Rule 4(f)(3) is designed to safeguard against *any* situation where unscrupulous foreign governments attempt to insulate entities within their borders from liability for wrongdoing in U.S. courts. The Rule does so by allowing courts to fashion a means for hearing cases on the merits even where ordinary methods of service are being hindered by resourceful defendants. The interpretation and application of the law by the court below runs counter to the policy condemning attempts to evade or obstruct service of process—a policy which has led numerous courts, both state and federal, to order substituted service on defendants. *See, e.g., Int'l Controls Corp. v. Vesco*, 593 F.2d 166 (2d Cir. 1979); *Smith v. Islamic Emirate of Afghanistan*, Nos. 01 CIV 10132, 01 CIV 10144, 2001 WL 1658211 (S.D.N.Y. Dec. 26, 2001); *Morgan Guaranty Trust Co. of N.Y. v. Hauser*, 584 N.Y.S.2d 65 (N.Y. App. Div. 1992); *Hollow v. Hollow*, 747 N.Y.S.2d 704 (N.Y. Sup. Ct. 2002).

Particularly instructive in this regard is *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980). In that case, a lawsuit was brought against Iran, Iranian agencies and instrumentalities, and private Iranian entities based on events that occurred during the 1979 Islamic Revolution. Because Iran had broken diplomatic ties with the United States, all the normal methods of service provided for explicitly by the Federal Rules had been cut off. *Id.* at 80-81. The Iranian defendants had attorneys who actively represented them before the dis-

trict court, but the defendants refused to allow service through the attorneys, and even refused to sign registered mail receipts. *Id.* In essence, the Iranian defendants actively thwarted service of process. Despite the fact that Iran was a sovereign state, the court found that it should not be allowed to intentionally avoid being served:

> This conduct can only be interpreted as an intentional avoidance on the part of Iran, its agencies and instrumentalities, of service of process in an effort to frustrate the instant suits. Justice demands that a substitute form of service be formulated, one calculated to provide defendants with adequate notice of the pendency and nature of the instant suits.

Id. at 81. The *New England Merchants* court added that (as is the case here) the defendants had actual notice of the nature and pendency of the lawsuits against them, and thus held that the defendants could be served via telex and by service upon counsel. *Id.*

Justice demands no less in this case. Indeed, granting this petition would clarify an important issue concerning the ability of foreign states to immunize defendants located within their borders from service of process in U.S. courts. Under the interpretation of the court below, an agreement between a foreign state and a defendant within that state can completely immunize the defendant from service. Thus, Colombia, Italy and Saudi Arabia could effectively insulate the Cali drug cartel, the Mafia, and al-Qaeda from service of process. Any foreign government could insulate its nationals, business organizations and unincorporated associations from suit in U.S. courts, thus leaving them free to breach contracts with U.S. firms, sell hazardous products in the United States, or violate U.S. antitrust law with impunity—provided that they took the simple step of ensuring that they had

no agent in the United States who could accept service of process on their behalf.

The circuit court's opinion would allow any foreign country to completely protect any person or organization located within its borders from the U.S. courts. That a foreign state would have the ability to do so merely by entering into an agreement identical to the Headquarters Agreement is inimical to U.S. law.

b. *Subversion of the FSIA*. For 140 years—beginning with *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)—the United States subscribed to the "absolute" theory of foreign sovereign immunity, which provided nation-states with broad immunity from the judicial process of other countries. *See* Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 196 (2001). Under the absolute theory of immunity, there was no distinction between a country's public acts (those which can only be performed by governments) and its private acts (those which can also be performed by non-governmental actors, such as commercial trading): Foreign states simply could not be sued in U.S. courts, even when they were engaged in commercial activities. *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 574 (1926). The United States adhered to the absolute theory of sovereign immunity until May 19, 1952, when the State Department advised the Attorney General to adopt the "restrictive" theory of sovereign immunity instead, which recognized sovereign immunity only for the public acts of a state, and not for a state's private acts. *See Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) ("Tate Letter").

The most significant rationale for the change of policy that the Tate Letter announced was the rise of socialist political systems. Continued U.S. commitment to absolute immunity would have produced the inequitable situation where private U.S. companies were amenable to suit in foreign courts, while socialist countries' state trading companies were immune to suit in the United States, even if they had, for example, breached their contracts with U.S. firms. Tate Letter, *supra*, at 985 ("[W]idespread and increasing activity on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined by the courts."); *see also* David MacKusick, Comment, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741, 778 (1996) ("The unfairness of subjecting a private trader to legal responsibility while granting immunity to a government engaged in the same transaction soon became apparent."). In 1976, the restrictive theory of sovereign immunity was codified into federal statutory law as the FSIA, 28 U.S.C. § 1602 *et seq*. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 612 (1992) ("[T]he Act . . . largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952."); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983).

The holding of the court below that foreign states can completely immunize corporations or unincorporated associations within their borders from U.S. litigation for violation of U.S. laws by entering an agreement similar to the Headquarters Agreement turns the restrictive theory of sovereign immunity on its head. The court below creates a new class of businesses or unincorporated associations that can injure U.S. companies—and even file suit against U.S. companies—but cannot be sued by them. Moreover, the FSIA expressly permits service of

process on foreign states, including each of OPEC's fifteen member states. *See* 28 U.S.C. § 1608(b). Yet the decision of the court below incongruously holds that in the face of this permission to effect service on foreign states, Austria can nonetheless completely immunize an organization comprised of OPEC's fifteen member states from service of process.

The fact that the decision below would allow foreign states to provide persons and entities with complete immunity from U.S. judicial review of their wrongdoing demonstrates that this is a question of exceptional importance that should be considered by this Court.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT.

The Eleventh Circuit's *Prewitt* opinion creates a circuit split with the Ninth Circuit. While the Eleventh Circuit held that service under Rule 4(f)(3) is ineffective if specifically precluded by foreign law, the Ninth Circuit has stated explicitly that the laws of a foreign state pose no barrier to service of process under Rule 4(f)(3). This is not an inconsequential circuit split; rather, this circuit split goes to the very heart of why Rule 4(f)(3) was drafted.

The Eleventh Circuit's holding that service under Rule 4(f)(3) is ineffective if specifically precluded by foreign law directly conflicts with the Ninth Circuit's interpretation in *Rio Properties*. In *Rio Properties*, the Ninth Circuit explained that there are only two requirements for service of process to be valid under Rule 4(f)(3): The service must be directed by the court, and must not be prohibited by international agreement. 284 F.3d at 1014. The Ninth Circuit stated that "[n]o other limitations are evident from the text." *Id.* "In fact," the court continued, "as long as court-directed and not prohibited by an inter-

national agreement, service of process ordered under Rule 4(f)(3) may be accomplished *in contravention of the laws of the foreign country*." *Id.* (emphasis added). The Ninth Circuit's view clearly conflicts with the position here advanced by the Eleventh Circuit, that the service in question cannot be authorized in a manner prohibited by foreign law.

Not only does the view adopted by the lower court conflict with the Ninth Circuit's interpretation, but it also conflicts with the reasoned view of numerous district courts. *See Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002); *Forum Fin. Group, LLC v. President & Fellows of Harvard Coll.*, 199 F.R.D. 22, 23-24 & n.3 (D. Maine 2001); *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 459 n.4 (S.D. Fla. 1998) (noting that "it appears to be in the power of this Court to define a method of service" under Fed. R. Civ. P. 4(f)(3) "by which the parties in Belize may be acceptably contacted, regardless of whether or not such method contravenes Belize's law"); *Semtek Int'l Inc. v. Merkuriy Ltd.*, No. 95-11820, 1996 U.S. Dist. LEXIS 22248, at *6 (D. Mass. Aug. 13, 1996) (explaining that "service may be accomplished in contravention of the laws of the foreign country . . . by order of the court" pursuant to Rule 4(f)(3)).

The Eleventh Circuit addressed only *Rio Properties*, and attempted to distinguish the present case from *Rio Properties* on its facts, without even addressing the chief principle that creates the circuit split, that "service of process under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country." *Rio Props.*, 284 F.3d at 1014. Instead of acknowledging and directly addressing this principle, the Eleventh Circuit stated that "in *Rio*, there was no discussion of Costa Rican law at all, much less of any prohibitions relating

to service of process." *Prewitt*, 353 F.3d at 928. However, under the explicit principle outlined in *Rio Properties*, service pursuant to Rule 4(f)(3) would be acceptable even in the present situation. Any factual distinctions between the two cases cannot minimize this circuit split.

The court below attempted to temper its broad holding and minimize the circuit split that it created:

> We do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law. Rather, we are satisfied that under the facts and circumstances of this case, directing service of process would constitute a clear abuse of discretion.

Prewitt, 353 F.3d at 928 n.21. Yet, as observed by the court below, the *only* apparent "facts and circumstances of this case" that led the Eleventh Circuit to conclude that service of process cannot be fashioned on OPEC was Austria's agreement with OPEC designed to prevent OPEC from being served with process without its consent. The panel's opinion thus holds that *whenever a foreign state enters into an agreement designed to insulate an entity located within that state from service in U.S. courts, that agreement is always effective.*

This circuit split is far from inconsequential. Rather, it goes to the very purposes underlying Rule 4(f)(3). Rule 4(f)(3) was crafted precisely because foreign states might attempt to unreasonably restrict service of process on defendants located within their borders. In particular, the Advisory Committee Notes to Rule 4(f)(3) explain that one purpose of the provision is to prevent foreign states from frustrating service of "a complaint seeking . . . to enforce the antitrust laws of the United States." Rule 4(f)(3) Advisory Committee Notes at 48. The

framers were concerned that a sympathetic foreign state might try to allow businesses or unincorporated associations within its borders to violate U.S. antitrust law with impunity by entering into an agreement protecting them from service of process. *This is precisely the case here, as that is exactly what the Headquarters Agreement between OPEC and Austria does.* Thus, this Court would do well to resolve the split between the Ninth and Eleventh Circuits, as this split touches on the very purposes for which Rule 4(f)(3) was drafted.

III. THE DECISION BELOW MISREADS RULE 4(F)(3).

The Eleventh Circuit's opinion elevates the Advisory Committee Notes above the plain language of Rule 4(f)(3) and, additionally, misinterprets the Advisory Committee Notes. Contrary to the circuit court's holding, under both the plain language of the Rule and the Advisory Committee Notes, the laws of foreign states pose no barrier to a district court's power to fashion service of process pursuant to Rule 4(f)(3).

A foreign law limitation is built into the service of process authorized by Rules 4(f)(2)(A) and (C). Service of process is proper under Rule 4(f)(2)(A) if it takes place "in the manner prescribed by the law of the foreign country or service in that country in an action in any of its courts of general jurisdiction." Similarly, service is proper under Rule 4(f)(2)(C) through personal delivery to the individual defendant or by any form of mail requiring a signed receipt "unless prohibited by the law of the foreign country." Thus, Rules 4(f)(2)(A) and (C) expressly make the law of the foreign state in which the defendant is located relevant to a district court's determination of whether it has the power to fashion service of process.

The language of Rules 4(f)(2)(A) and (C) stands in marked contrast to the language of Rule 4(f)(3). Rule 4(f)(3) states simply that "service upon an individual from whom a waiver has not been obtained and filed . . . may be effected in a place not within any judicial district of the United States . . . (3) by other means not prohibited by international agreement as may be directed by the court." This language does not mention any limitation imposed by the law of a foreign state, and thus in no way implies that the law of a foreign state can prevent a district court from fashioning service of process under Rule 4(f)(3).

The Ninth Circuit, after considering the language of Rule and the accompanying Advisory Committee Notes, described the two requirements for service of process under Fed. R. Civ. P. 4(f)(3): "As obvious from its plain language, service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by international agreement." *Rio Props., Inc.*, 284 F.3d at 1014. The Ninth Circuit stated definitively that "*[n]o other limitations* are evident from the text." *Id.* (emphasis added); *see also* DAVID D. SIEGEL, SUPPLEMENTARY PRACTICE COMMENTARY C4-24, 28 U.S.C.A. FED. R. CIV. P. 4 at 73 (West Supp. 2000) ("It is only a method barred by 'international agreement', and presumably *specifically* barred by that agreement, that the court must stay away from.") (emphasis in original); Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 350-51 (2003) ("So long as the authorized method of service is not prohibited by international agreement, it need not comply with foreign law."). Thus, the *only* limitation upon a court validly directing service pursuant to Rule 4(f)(3) is that the service cannot be prohibited by international agreement.

It is undisputed in this case that court-directed service of process upon OPEC is not prohibited by any international agreement. Indeed, neither OPEC nor the court below ever claimed that service was prohibited by an international agreement within the meaning of Rule 4(f)(3). The Headquarters Agreement between Austria and OPEC is not an international agreement under Rule 4(f)(3) because the United States is not a party to the Headquarters Agreement and is therefore not bound by any of its provisions. *See* Vienna Convention on the Law of Treaties, Art. 34, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (1987). Nor do any other agreements or treaties exist that might preclude OPEC from being served with process. Since service directed by the district court would not be prohibited by any "international agreement" within the meaning of the Rule, the district court plainly has the power to fashion alternative means of service under Fed. R. Civ. P. 4(f)(3).

The two propositions supplied by the circuit court for its conclusion that service on OPEC cannot lawfully be accomplished under Fed. R. Civ. P. 4(f)(3) should carry little weight with this Court. First, the court below states that the court "cannot read 4(f)(3) as permitting that which has already been specifically prohibited under 4(f)(2)." *Prewitt*, 353 F.3d at 927. Although the court does not specify the reasoning underlying that proposition, neither of the two possible arguments that could be derived from this statement are persuasive.

The argument that the foreign law limitations in Rule 4(f)(2) must of necessity apply to Rule 4(f)(3) is completely contrary to both the structure and language of Rule 4(f). Rule 4(f)(2) covers means of service on parties located in foreign countries that a court must *auto-*

matically consider valid when there is no internationally agreed means of service. It provides, *inter alia*, that a district court must consider service valid when it occurs in the manner prescribed by the law of the foreign country, or when there is either personal delivery or else delivery through mail requiring a signed receipt, so long as such delivery does not violate the laws of the foreign state. Thus, Rule 4(f)(2) is designed to make the law of the foreign state relevant in cases where service must automatically be accepted as valid by the district court.

In contrast, Rule 4(f)(3) provides for "other means [of service] not prohibited by international agreement" when service cannot successfully be accomplished pursuant to Rule 4(f)(2). Unlike Rule 4(f)(2), Rule 4(f)(3) does not enumerate means of service that a district court must automatically consider to be valid. Rule 4(f)(3) instead requires the district court to carefully consider what means of service would be proper under such circumstances. Thus, it makes structural sense that the foreign law limitations in Rule 4(f)(2) would be absent from Rule 4(f)(3).

The fact that the foreign law limitations in Rule 4(f)(2) are absent from Rule 4(f)(3) is also made perfectly clear by the language of the Rule: The language indicating that service of process must comply with foreign law *only* exists in Rule 4(f)(2), and is purposefully excluded from Rule 4(f)(3). Moreover, the disjunctive term "or" separating Rule 4(f)(2) from Rule 4(f)(3) demonstrates that the foreign law limitations of Fed. R. Civ. P. 4(f)(2) should not be read into Rule 4(f)(3). *See Rio Props., Inc.*, 284 F.3d at 1015 ("Indeed, Rule 4(f)(3) is one of three separately numbered subsections in Rule 4(f), and each subsection is separated from the one previous merely by the simple conjunction 'or.' "); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)

("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . . ."). The framers of the Federal Rules clearly knew how to include the foreign law limitation in Rule 4(f)(3), yet declined to do so. On numerous occasions, this Court has refused to read language into statutory provisions when Congress knew how to include such language, yet did not do so. The same standards should apply to an interpretation of the Federal Rules. *See Chapman v. United States*, 500 U.S. 453, 459 (1991) ("Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD."); *Lehman v. Nakshian*, 453 U.S. 156, 162 (1981) ("Congress . . . demonstrated that it knew how to provide a statutory right to a jury trial when it wished to do so elsewhere in the very 'legislation cited[.]' But in § 15 it failed explicitly to do so.") (citation omitted); *United States v. Healy*, 376 U.S. 75, 84 (1964) ("Congress knew how to choose words to refer solely to commercial airliners when it wished to do so.").

The second potential meaning of the Court's argument—that if service by registered mail could not be lawfully accomplished pursuant to Rule 4(f)(2), then it cannot be lawfully accomplished under Rule 4(f)(3) either—is equally invalid. Initially, there are numerous methods of accomplishing service pursuant to Rule 4(f)(3) that do not involve registered mail, including service by e-mail, *see Rio Props.*, 284 F.3d at 1017-18, by fax transmission, *see Ryan*, 2002 WL 1628933, at *2, or by publication, *see Smith*, 2001 WL 1658211, at *2-*3. Moreover, the fact that the *method* of service that might be court directed under Rule 4(f)(3)—*e.g.*, service by mail—is the same as previously made *without* court direction is irrelevant. The key is that after a judge has authorized the service pursuant to Rule 4(f)(3), that ser-

vice is legitimate *even if* it contravenes the law of a foreign state. The relevant difference is that service under Rule 4(f)(2) is made by the Clerk of the Court without prior judicial consideration, whereas Rule 4(f)(3) requires such consideration. A decision to fashion alternative means of service under Rule 4(f)(3) thus appropriately carries with it the authority of the judicial branch when the service directed contravenes foreign law. Reading the foreign law limitations of Rule 4(f)(2) into Rule 4(f)(3) is therefore contrary to the plain language, the structure, and the purpose of Rule 4.

The circuit court's second argument for why service cannot be effected on OPEC under Fed. R. Civ. P. 4(f)(3) was based on the 1993 Advisory Committee Notes, which state:

> Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. . . . Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law.

Based on the Advisory Committee Notes' observation that "an earnest effort should be made to devise a method of communication that . . . minimizes offense to foreign law," the court below created a completely new requirement for service under Rule 4(f)(3): that it must not be specifically prohibited by the law of the foreign country. The fact that the court below ruled that service upon OPEC was impossible because of the Headquarters Agreement is crystal clear: The court stated that "directing service of process would constitute a clear abuse of discretion" in this case. *See Prewitt*, 353 F.3d at 928 n.21.

The first problem with the circuit court's creation of this new requirement is that it "[e]levate[s] to the level of statutory text a phrase taken from the legislative history" of Rule 4. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., dissenting). This is clearly unacceptable. *See Administrator, FAA v. Robertson*, 422 U.S. 255, 262-63 (1975) (noting that resort to legislative history is only compelled when the plain language is "unclear and ambiguous"); *Clark v. Long*, 255 F.3d 555, 559 (8th Cir. 2001) ("An advisory committee note, of course, does not have the force of law . . . ."); *In re Evanston Motor Co.*, 735 F.2d 1029, 1032 (7th Cir. 1984) (basing its interpretation of Fed. R. Bankr. P. 509(c) on the plain language of the rule, and holding that the Advisory Committee Notes would not be controlling if they contradicted the plain language). The circuit court cannot derive a requirement for service under Fed. R. Civ. P. 4(f)(3) from the Advisory Committee Notes if such a requirement is absent from the language of the Rule.

Moreover, the circuit court's interpretation of the Advisory Committee Notes is flawed. The Notes state only that "an earnest effort should be made to devise a method of communication that . . . minimizes offense to foreign law." The circuit court transforms the suggestion that the method of service should "minimize offense" to foreign law into a *requirement* that service cannot contravene a foreign state's laws. This interpretation is unacceptable. First, the Advisory Committee's statement that the district court should make "an earnest effort" to minimize offense is not a requirement binding upon the court, but is only a *guideline* for proceeding with service of process. Moreover, minimizing offense to foreign law is *not* the same as refusing to violate foreign law. In fact, even the suggestion that offense to foreign law must be "minimize[d]" demonstrates that service fashioned pur-

suant to Rule 4(f)(3) *is legitimate even if it does violate the law of a foreign state.*

Thus, the court below based its conclusion that service of process cannot lawfully be effected on OPEC under the Federal Rules of Civil Procedure not on the text of the Rule, but rather on the Advisory Committee Notes. And even the Advisory Committee Notes do not support the circuit court's conclusion that OPEC cannot be lawfully served under the Federal Rules, because they only state that a court fashioning alternative means of service under Rule 4(f)(3) must endeavor to "minimize offense" to foreign law; the Advisory Committee Notes do not put forward any kind of requirement concerning compliance with the law of a foreign state.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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